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(2)

No. 07-276

IN THE

Supreme Court of the United States

GRANT BAKER, *et al.*,
Cross-Petitioners,

v.

EXXON MOBIL CORPORATION, *et al.*,
Cross-Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

Cross-petitioners, who were plaintiffs-appellees below, are Grant Baker, Louie E. Alber, Ahmet Artuner, Jeffrey Bailey, William Bennett, Michael Wayne Bullock, Robyne L. Butler, Albert Ray Carroll, Larry L. Dooley, Mark Doumit, Douglas R. Jensen, Dennis G. Johnson, Donald P. Kompkoff, Sr., Josef Kopecky, Daniel Lowell, Andrean E. Martusheff, Carol Ann Maxwell, Jacquelan Jill Maxwell, Robert A. Maxwell, Sr., Michael McLenaghan, Elenore E. McMullen, Leslie R. Meredith, Leonard S. Ogle, Steven T. Olsen, August M. Pedersen, Jr., Mary Lou Redmond, Joseph David Stanton, Jean A. Tisdall, Darrell Wood, the Alaska Sport Fishing Ass'n, Debra Lee, Inc., Dew Drop, Inc., and the Native Village of Tatitlek. They are representatives of a punitive damages class certified by the district court and defined as "all persons who possess or assert a claim for punitive damages" arising out of the grounding of the EXXON VALDEZ and the resulting oil spill, except for certain governmental entities. App. 126a.[1]

Cross-respondents are Exxon Shipping Company (now known as SeaRiver Maritime, Inc.) and Exxon Mobil Corporation, defendants-appellants below. Joseph Hazelwood (the master of the EXXON VALDEZ) was also a defendant-appellant below and is therefore a respondent under Rule 12.6.

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[1] Citations to "App." indicate the Appendix to the Petition in No. 07-219. Citations to "ER (1997)" and "RER (1997)" indicate materials available in Appellants' Joint Excerpts of Record and Appellants' Joint Rebuttal Excerpts of Record filed in the first Ninth Circuit appeal (No. 97-35191). Citations to "ER (2004)" indicate materials available in Appellants' Joint Excerpts of Record filed in the third Ninth Circuit appeal (No. 04-035182). Citations to "PX' and "DX" indicate exhibits admitted at trial. The transcript of the 1994 trial is cited by book, page and line, so that, for example, "21 Tr. 3538:13-41:24" means Volume 21, from page 3538, line 13, to page 3541, line 24. "CD" refers by docket number to materials in the clerk's record in the district court. Emphasis is supplied throughout, except where otherwise stated, and internal quotations and citations are omitted.

RULE 29.6 DISCLOSURE

All of the stock of Exxon Shipping Company is owned directly or indirectly by Exxon Mobil Corporation. Exxon Mobil Corporation has no parent corporation and no person or entity owns 10% or more of its stock.

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BRIEF IN OPPOSITION TO CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Respondents Exxon Shipping Company and Exxon Mobil Corporation (collectively, "Exxon") hereby oppose the Conditional Cross-Petition ("cross-petition" or "CP") for a writ of certiorari.

INTRODUCTION

Plaintiffs' cross-petition does not meet the most minimal requirements for a grant of certiorari. Plaintiffs do not offer any argument that the Ninth Circuit committed any legal error in reducing the punitive award in this case. They do not suggest that the Ninth Circuit's reduction of the award created a conflict with any decision of any other court of appeals or with any decision of any state court of last resort. They do not assert that there is any need for the exercise of this Court's supervisory powers. They do not argue that the reduction of the award conflicted with any relevant decision of this Court. Even on the most generous reading, there is absolutely nothing in the cross-petition that indicates that the requirements of this Court's Rule 10 have been met.

Plaintiffs' "Question Presented" itself shows that there is no basis to grant certiorari to review whether the award should have been reduced. Plaintiffs nowhere assert that reduction of the award was based on a rule of law that the Ninth Circuit stated improperly. They do not offer a word of criticism of any rule of law that the Ninth Circuit applied or stated. They argue merely that the application of rules of law that were "properly stated" within the sense of Rule 10 produced a result they do not like. Rule 10 states explicitly that certiorari will "rarely" be granted in such circumstances.

Indeed, viewed in the light of Rule 10, the reasons plaintiffs *do* offer for granting certiorari with respect to the reduction of the award are almost frivolous. Plaintiffs say that this Court should review the reduction of the award because a lot of time has passed since the verdict was rendered. CP 2-3.

They say that the district court upheld the award and that a judge on the panel dissented. CP 12-13. And they say that it will not be all that much trouble for this Court to grant their cross-petition, assuming the petition is granted. CP 13. Those are the *only* arguments plaintiffs actually make in support of their cross-petition. And not one of them has the slightest connection to the reasons for granting certiorari set forth in Rule 10. Accordingly, it is clear that plaintiffs' cross-petition should be denied.

Plaintiffs themselves can hardly have thought otherwise. On the contrary, the tactical motivation for their cross-petition is obvious—not to make a serious argument that the Ninth Circuit's reduction of the award is worthy of certiorari, but to use the device of a cross-petition to lambaste Exxon, to evade the length requirements of Rule 33(g)(ii), to try to obtain the last word in briefing the matter, and to divert the Court's attention from the serious questions of maritime law and constitutional law that are the subject of the petition. That tactic should not succeed. In any event, Exxon is mindful of its obligations under this Court's Rule 15.2 to point out in this Brief the abundant factual inaccuracies of the cross-petition. Accordingly Exxon takes this opportunity to "point out in the brief in opposition, and not later, any perceived misstatement made in the [cross] petition," Rule 15.2, and to give the Court an accurate understanding of the truth about the matters discussed in plaintiffs' cross-petition.

ARGUMENT

I. THE MATTERS DISCUSSED IN THE CROSS-PETITION HAVE NO RELEVANCE TO THE LEGAL ISSUES THIS CASE RAISES.

The first Question Presented in the petition turns entirely on whether the jury was properly instructed on the question of vicarious punitive liability when it was told that if it found Captain Hazelwood reckless it must also find Exxon reckless. This is a pure question of law, which does not depend in any way on the facts. Plaintiffs now try to justify the

award on the basis of Exxon's conduct in returning Hazelwood to his job and supervising him. CP 4-6. But the whole point of Exxon's challenge to the instructional error about vicarious punitive damages liability is that the Ninth Circuit's established *Protectus* rule made it *unnecessary* for the jury to consider whether the facts on which plaintiffs now rely were true. The instruction allowed, indeed invited, the jury to bypass the whole question of Exxon's *independent* conduct. This Court does not allow any judgment, let alone a huge punitive damages award, to be justified on the basis of a theory of liability that the jury was instructed it did not need to consider. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459-60 (1993); *Greenbelt Co-op. Pub. Ass'n v. Bresler*, 398 U.S. 6, 11 (1970); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962).

The facts asserted in plaintiffs' cross-petition have similarly nothing to do with the second Question Presented. It, too, is a pure question of law. When Congress has enacted a comprehensive statute, do federal judges have the power to add maritime-law remedies to those Congress has provided? That question has nothing to do with the particular facts of a case.

The third Question Presented also presents pure issues of law. It asks the Court to articulate and enforce standards under maritime law or the due process clause to ensure that maritime punitive damages awards do not exceed what is necessary to achieve punishment and deterrence, and that they otherwise fit the policies that inform maritime law. Since Exxon's total spill-related expenditure of over $3.4 billion on clean up, claims payments, fines, restitution, and other costs is unquestionably more than sufficient to deter anyone from anything, plaintiffs' factual recitations in the cross-petition add nothing of value to the issues the Court must consider.

Only one point that plaintiffs make has relevance to the issues truly presented here, and it tends to show why a $2.5 billion punitive damages award here was *excessive*. Plaintiffs quote the Environmental Impact Statement for the Trans-Alaska Pipeline System, and point out that the risk of an oil spill, and the resulting potential for damage, was known in 1973. CP 3-4. So it was. Many of the plaintiffs in this case opposed the construction of the Trans-Alaska Pipeline, because it would result in tanker traffic through Prince William Sound, and urged that the risk to their fishing income was not worth taking. The relevant state and federal officials considered their concerns, analyzed the matter thoroughly in the Environmental Impact Statement, balanced all the competing considerations, and at the end of the day Congress passed the Trans-Alaska Pipeline Authorization Act, which authorized and directed the construction of the Pipeline, 43 U.S.C. § 1653(a), and set up a special Liability Fund and a special liability regime to pay compensation in the event a spill did occur. 43 U.S.C. § 1653(c). The point relevant here is that the risks were known to everyone, not just Exxon. Congress made the political judgment that those risks were worth taking, for reasons of national security and national energy policy. As the Ninth Circuit observed, "fuel for the United States at moderate expense has great social value." App. 101a. That fact is not an excuse for negligent or reckless conduct. But it emphasizes that punishment should be limited to what is actually necessary to punish and deter. Enormous punitive damages that serve no rational purpose of punishment or deterrence only discourage investment in socially useful activities, to no one's benefit except plaintiffs and their lawyers.

In addition to their irrelevance to the legal issues presented in this case, plaintiffs' factual assertions distort the course of proceedings below and the factual background of this case.

II. FULL COMPENSATION WAS PAID PROMPTLY, NOT DELAYED.

The oil spill was a tragic event, which Exxon deeply regrets, and for which Exxon has paid billions of dollars. But contrary to the suggestions in the cross-petition, this is not a case where plaintiffs' injuries have gone uncompensated or been underpaid, or where payment for injury was unduly delayed.

Immediately following the spill, in the spring of 1989, Exxon set up claims offices throughout the affected region, staffed by competent adjusters, and began paying claims to fishermen and others. Typically, these claims were paid on an "advance" basis, pursuant to estimates of what the fishermen *would* earn in 1989. ER (2004) 452-55. Since fish processors pay fishermen at the end of the fishing season or thereafter, many commercial fishermen were paid *before* they would have received payment for their fish if the fisheries had been open. *Id.* Such payments did not so much compensate for losses as *prevent* them. For the most part, Exxon paid claims without requiring any releases, as a result of which the plaintiffs, fully compensated long ago, have been able to pursue these punitive damages claims. Exxon paid over $300 million before its formal claims program ended in 1991. *Id.* Alyeska Pipeline Service Company, the operator of the Valdez Marine Terminal, later paid another $98 million to resolve claims arising from its failure to prepare a proper contingency plan for clean-up of spills in Prince William Sound and failure to keep adequate equipment on hand. *Cf.* CP 4; App. 35a. Millions in claims were also paid by the Trans-Alaska Pipeline Liability Fund, an entity created by the Trans-Alaska Pipeline Authorization Act, 43 U.S.C. § 1653(c), to pay claims in the event of a spill of oil transported through the Trans-Alaska Pipeline System. *See In re the Glacier Bay*, 944 F.2d 577 (9th Cir. 1991). The Act authorized the Fund to recover its payments from those

responsible for the spill. The Fund accordingly sought and obtained reimbursement from Exxon.

The cross-petition implies that granting review of this case will somehow deny plaintiffs a right to receive compensation they are owed. CP 7-8. Nothing could be further from the truth. This case is solely and entirely about *punitive* damages, and the purposes of punitive damages are punishment and deterrence, not compensation. *See Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991); *accord BMW of North America v. Gore*, 517 U.S. 559, 568 (1994). Plaintiffs cite this Court's decision in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), but the relevant passage says that modern punitive damages no longer serve any compensatory function, and are not to be used, as plaintiffs would have it, as a substitute for emotional distress damages. *Id.* at 437 n.11. On the contrary, in reviewing a punitive award, "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages." *State Farm Mutual Life Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003).

Plaintiffs say that maritime law recoveries are "narrow" and reflect "nineteenth century conceptions." CP 8. Again, not so. Maritime law traditionally provides generous compensation, *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 389 (1970), especially for fishermen, the "favorites of admiralty." *Union Oil Co. v. Oppen*, 501 F.2d 558, 567 (9th Cir. 1974). In any event, the emotional distress claims to which plaintiffs allude were dismissed by the district court, CD 5590 at 5-6, on the authority of *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), a case arising under the FELA, another liability regime famously generous to plaintiffs. This Court in *Gottshall* held that, absent physical injury, emotional distress damages could not be recovered by a plaintiff outside the "zone of danger." *Id.* No court would allow recovery for the emotional distress claims plaintiffs brought here—for emotional distress arising solely from loss

of income—a fact plaintiffs recognized when they did not even appeal the district court's dismissal of those claims.[2] There was, in short, nothing at all "narrow" or "nineteenth century" about the liability standard here.

The compensation actually paid, moreover, was generous. Plaintiffs claim, and the Ninth Circuit agreed, that the total economic "harm" from the spill was $504 million, in Exxon's view an exaggerated figure. App. 38a. But whether the figure is right or not, it is clear that by the time of trial all that was left to be paid, after deducting claims payments and settlements, was $19.6 million, a mere 4% of the total "harm." Those were the damages awarded by the judgment. The close fit shows that Exxon's claims program compensated plaintiffs fully and fairly.

Also, plaintiffs do not mention that they were among the principal beneficiaries of the $2.1 billion that Exxon spent on clean-up, much of which went for wages to local residents for work on the clean up, or for rent of commercial fishing vessels idled by the state's closure of the fisheries. Exxon agreed not to offset these wage and rental payments against lost fishing income, even though the payments were very large, leading newspapers in Alaska in 1989 to talk about "spillionaires." Economic studies in the record show that 1989 and 1990 were boom years in Alaska, and especially in South Central Alaska, in large part because of Exxon's expenditures in the region for spill clean up and claims com-

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[2] The district court's suggestion that the spill produced high incidences of depression and other mental disorders, CP 7, is not based on any evidence introduced at trial, but on articles by plaintiffs' retained experts. CD 7501, Oesting Dec., Exhs. 4-10. Had this evidence been put before the jury, Exxon would have shown that their conclusions were methodologically and statistically absurd. CD 7535, Berk Dec. This is a textbook example of what the Court warned about in *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007). It is profoundly unfair to impose punishment based on allegations of harm that a defendant had no opportunity to rebut at trial, adding yet another "near standardless dimension to the punitive damages equation." *Id.* at 1063.

pensation. CD 7488, Deacon Aff. ¶ 2-3. In the four fisheries principally affected (Prince William Sound, Cook Inlet, Kodiak and Chignik), total fishing industry earnings (including earnings from fishing, claims payments and boat rentals) were actually *up* 19% in 1989 over 1988, itself a record year. *Id.*[3]

Plaintiffs also claim Alaska Natives suffered uncompensated harms. But in fact their claims of harm from lost subsistence[4] were settled in 1994 for $20 million, $5800 for each of the 3455 members of the Alaska Native Class, equivalent to $20,000 per family assuming an average of 3.5 members per family. Moreover, only 65 class members (fewer than 2%) live in the area heavily oiled by the spill,

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[3] Plaintiffs try to deprecate the enormous clean-up effort by quoting an Exxon employee, on the third day after the spill, urging that *Alyeska*, which was responsible for initial clean-up, should get equipment on the job faster. CP 6-7. That isolated sound-bite does not contradict or diminish the fact that Exxon spent $2.1 billion on clean-up. Nor was it ineffective. The very NOAA report that plaintiffs misleadingly cite, CP 6, shows that natural processes and Exxon's clean-up together removed 98% of the oil.

[4] "Subsistence" perhaps needs to be explained. In Alaska, activities known as subsistence—i.e., hunting, fishing and gathering resources, with the intention of making use of them for food—are carried out by Natives and non-Natives alike. The Supreme Court of Alaska has held that it is a violation of the Alaska Constitution to restrict to Natives (or even to rural residents) the right to do subsistence. *McDowell v. State*, 785 P.2d 1 (Alaska 1989). Subsistence by Natives is not materially different from subsistence by other Alaskans. According to plaintiffs' own expert report, the overwhelming majority of the subsistence harvest is fish (principally salmon), seal, and land mammals such as bear or moose. Salmon alone accounts for 49% of the subsistence harvest. Seal and land mammals are hunted with rifles; the same boats and gear used to take salmon and other fish for commercial purposes are ordinarily used to take "subsistence" fish—although subsistence "openings" (that is, the times at which a particular location is open to fishing) may be different from commercial openings. Netfuls of salmon caught commercially may (and frequently do) become "subsistence" salmon when a commercial fisherman who happens to be a Native decides to devote them to home use. CD 4373, Braund Aff. Exh. 2 at 38-40.

those who reside in the Village of Chenega Bay in southwest Prince William Sound. CD 4373, Braund Aff. Exh. 2 at 27. The residents of Chenega Bay were paid their share of the $20 million settlement with the Alaska Native Class, plus as the shareholders of Chenega Corporation they also received $2.3 million from a separate settlement with Alyeska Pipeline Service Co., and $12.1 million from the Trans Alaska Pipeline Liability Fund on the theory that they temporarily lost the ability to use their lands for subsistence purposes. CD 7535, Daum Dec. Exh. C at 2. The total came to over $227,000 per person, almost $800,000 per family, and nearly $15 million for the Village.

Plaintiffs suggest finally that this case has taken a long time, as if that were somehow a reason for denying review of the manifest errors below. Exxon makes no apology for taking an appeal from a judgment which the Ninth Circuit has already ruled was $2.5 *billion* in excess of what the Constitution permits. But the delay is primarily the result of the confusion in the case law and the lack of clear legal standards for maritime punitive damages awards. That is a reason for granting certiorari, not denying it.[5] As the petition said, by

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[5] The chronology of the proceedings shows that Exxon did not slow resolution of this case, despite plaintiffs' implication. Trial of the punitive damages issues in 1994 took 25 trial days, with 49 live witnesses, but 17 days of jury deliberations. (Plaintiffs' exaggerated figures, CP 2, include Phase II, where the issue was lost fishing income, not punitive damages.) Judgment was entered January 28, 1997. Exxon promptly appealed. Briefing the first appeal was concluded on January 5, 1998. The Ninth Circuit set oral argument for May 3, 1999, and rendered decision November 7, 2001. The district court took until December 9, 2002 to render its decision on remand; the Ninth Circuit vacated that ruling *sua sponte*, and the district court did not render its second decision until January 28, 2004. Exxon again promptly appealed, and briefing was completed on January 7, 2005. The Ninth Circuit set argument for January 27, 2006, and rendered its second opinion December 22, 2006. Exxon promptly moved for panel and en banc rehearing, which the Ninth Circuit denied, after modifying its opinion, on May 23, 2007. Thus of the more than ten years that passed from entry of an appealable judgment to the Ninth Circuit's last decision, less than two years was devoted to

granting certiorari the Court can provide appropriate guidance to the lower courts, and make sure that future cases take less time than this one. Pet. 27.

III. PLAINTIFFS DISTORT THE FACTS OF THE GROUNDING.

Echoing ignorant media reports that have circulated widely since the spill, plaintiffs portray the grounding of the EXXON VALDEZ as a simple case of drunk driving by Captain Hazelwood. Exxon stipulated at trial that Hazelwood was negligent in leaving the bridge, in violation of Exxon's policy, and that this violation of Exxon's policy was a legal cause of the grounding. Exxon does not complain here of the jury's finding that he was also reckless. But plaintiffs' characterization involves a considerable oversimplification of what happened. The oversimplification does not matter to the resolution of the pure issues of maritime and constitutional law that this case presents, *see* Part I, *supra*, but it does make correction appropriate under Rule 15.2.

It is indisputable that the immediate cause of the grounding of the EXXON VALDEZ was the failure of Third Mate Cousins, inexplicable even to himself, 16 Tr. 2402:3-03:5, to turn the ship away from Bligh Reef. As Admiral Yost, the Commandant of the Coast Guard, testified at trial, "[T]he primary cause ... of that grounding was a perfectly qualified third mate on the bridge of a ship that, through a period of a few minutes of inattention to duty ... ran the ship aground on a clear night with all the navigational aids watching him." 19 Tr. 3177:13-19.

The vessel departed the Marine Terminal at Valdez at 9:12 p.m. on March 23, 1989, and was guided through the

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briefing, the only part of the appellate process even partially under the parties' control.

In this Court, Exxon filed its petition slightly before the due date, without seeking any extension, and is filing this brief on its due date, again without seeking any extension.

Valdez Narrows by a state-licensed pilot. 6 Tr. 289:18-90:4. When the pilot left the vessel at 11:20 p.m., Captain Hazelwood took the "conn"—that is, took active command of the navigation of the vessel. The ship's radar showed ice in the inbound and outbound lanes of the Traffic Separation Scheme ("TSS"), a charted "highway" through Prince William Sound. Ships customarily steered out of the defined lanes to avoid ice, 21 Tr. 3509:3-6; the two previous outbound tankers had both done so. 21 Tr. 3538:13-41:24; DX 1735A. Hazelwood accordingly radioed the Coast Guard that he was going to "alter my course . . . to wend my way through the ice." PX 90A at 2330.54 hours.

Cousins helped the pilot transfer to the pilot boat. When Cousins returned, Hazelwood explained to Cousins how to maneuver around the ice. 7 Tr. 594:22-95:20; 8 Tr. 610:7-11.1; 15 Tr. 2367:1-11; 16 Tr. 2443:25-44:5. It was simple: turn right at the light—that is, when the ship came abeam (i.e., even with) Busby Island light, an easily identifiable landmark. 7 Tr. 597:22-98:7; 16 Tr. 2438:6-39:10. There was nothing dangerous or unusual about the turn Hazelwood planned. The Commandant of the Coast Guard testified that these were *not* treacherous waters. 19 Tr. 3181:18-82:8. (He should know, although both plaintiffs and the Ninth Circuit contradict him. CP 3, App. 22a.) The ship was not traveling at an unusual speed. 21 Tr. 3424:24-25:2, 3526:20-21, 3527:11-14. Visibility was good, the sea was calm. 16 Tr. 2402:22-24; 6 Tr. 272:24-73:3. Cousins carefully reviewed the planned maneuver with Hazelwood. 16 Tr. 2437:19-41:20. The district court acknowledged that Hazelwood's instructions to Cousins were "specific" and "correct." ER (1997) 567:17-18.

Having given his instructions, Hazelwood left the bridge and went to his cabin (a few seconds away) to do some paperwork related to avoiding a storm expected in the Gulf of Alaska. 8 Tr. 610:13-11:1; 614:6-15; 15 Tr. 2367:1-11. His departure from the bridge violated Exxon's Bridge Manual, a

written statement of company policy regarding the operation and navigation of its vessels which was placed on the bridge of every vessel, and which every watch officer was required to read and sign. DX 3450, §§ 2.1.5, 8.5; 18 Tr. 2861:11-62:8; 7 Tr. 488:18-89:1. Because the VALDEZ was leaving port, the Bridge Manual required both that the Master be on the bridge and that two officers be on the bridge. By leaving Cousins as the only officer on the bridge, Hazelwood violated both provisions. 12 Tr. 1685:19-21.[6] Hazelwood was later discharged for violating Exxon's rules. 18 Tr. 2906:11-07:14.

When Hazelwood went below, the position abeam Busby Island light was about two minutes away. 7 Tr. 428:3-6; 16 Tr. 2377:18-22. There was ample room for the VALDEZ to pass between Bligh Reef and the ice. 7 Tr. 593:14-94:17; 16 Tr. 2399:24-400:24. At 11:55, Cousins determined that the ship had come abeam the light. He noted his fix on the ship's chart, ordered the helmsman to turn the rudder 10° right, and called Hazelwood to tell him that the turn had begun. 16 Tr. 2381:16-85:16; 8 Tr. 615:10-16:1. The turn, however, had not begun. The ship's course recorder indicates that the rudder did not go over to 10° right until 12:02, seven minutes *after* the ship reached the turning point on which Hazelwood and Cousins had agreed. 21 Tr. 3527:20-

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[6] Leaving the bridge also violated Coast Guard pilotage rules. The vessel was required to be under the direction of a pilot federally certified to operate in Prince William Sound, and Hazelwood was the only person aboard who qualified. Cousins and Hazelwood both believed that the federal pilotage regulation no longer applied below Rocky Point, where the state pilot had been dropped. 6 Tr. 360:15-61:4, 362:15-63:1; 16 Tr. 2424:19-25:19. The federal pilotage requirement was purely technical; indeed the Coast Guard recommended eliminating it as unnecessary. 50 F.R. 26117, 26118 (June 24, 1985); 19 Tr. 3185:18-87:21. In any event, Cousins had substantial experience in Prince William Sound, and was familiar with its topography and aids to navigation. 16 Tr. 2415:20-17:20. Admiral Yost, the Commandant of the Coast Guard, agreed that Cousins was "perfectly qualified" to perform the maneuver. 19 Tr. 3177:14-15.

28:21. The rudder was then held steady at 10° right for five minutes. This steered the VALDEZ gradually back toward the shipping lanes, but not soon enough to avoid the reef, where the VALDEZ ran aground at 12:07 a.m. on March 24, 1989. 21 Tr. 3529:4-21. The objective evidence thus shows plainly that the turn was not made in accordance with Hazelwood's instructions.

Plaintiffs say that Exxon overworked its crews and that Cousins was fatigued. CP 5-6. The Ninth Circuit never reached this issue, App. 90a, so perhaps there is no reason to address it at all. But there is nothing to it. The Commandant of the Coast Guard testified that working conditions on the EXXON VALDEZ were comparable to "normal operating practice on every Coast Guard ship, every Navy ship [and] Merchant ship in the world." 19 Tr. 3182:15-83:5. Cousins himself, who had every reason to blame the accident on fatigue, if that had been the case, was adamant that fatigue had nothing to do with his actions, denied that he was tired, and testified that he had 10 hours' sleep during the 24 hours before the grounding. 16 Tr. 2463:4-16; 9 Tr. 977:19-78:3.

If the VALDEZ had begun turning abeam Busby Island light, as Hazelwood had instructed, it would have missed Bligh Reef by a wide margin. Even a 5° right rudder turn would have been enough. 21 Tr. 3534:3-36:12. And even at 12:02, when the ship actually began to turn, a 20° turn would have missed the reef. 21 Tr. 3537:17-38:2.

The jurors told the press they could not determine whether Hazelwood had been impaired by alcohol. ER (1997) 638-39, 652-54. But since Exxon accepts here the jurors' verdict that Hazelwood was reckless, it does not matter in this Court whether jurors found him reckless just for leaving the bridge, or whether they found him reckless because of his alcohol use, or both. (Either way, he was in violation of Exxon's policies. DX 3450 §§ 2.1.5, 8.5; 18 Tr. 2861:11-25; DX 3614 at S7304675970-7.) Contrary to the implications of the cross-petition, however, alcohol was a

factor in the grounding of the EXXON VALDEZ *only* if one assumes that, but for impairment by alcohol, Hazelwood would have chosen to remain on the bridge, and would not have chosen to work in his cabin on avoiding a storm in the Gulf of Alaska. That is certainly a permissible inference for a jury, but it is hardly a necessary one.[7]

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[7] Whether Hazelwood was in fact impaired by alcohol was hotly disputed at trial. Plaintiffs' calculation of Hazelwood's intake, CP 6, assumes a number of "early afternoon drinks," which the relevant witnesses served to a man they did not know but identified after the spill as Hazelwood. In fact their description did not fit Hazelwood, *compare* 6 Tr. 242:1-47:17, 5 Tr. 181:25-82:2 *with* 7 Tr. 513:10-15:3, and several witnesses confirmed that he was elsewhere at the time. 6 Tr. 276:25-78:8, 301:6:14; 17 Tr. 2716:4-24:9; 17 Tr. 2774:17-78:12. 2780:8-83:12; 5 Tr. 128:4-29:15. Every one of the 20 witnesses who observed him on the night of the grounding, Exxon employees and non-employees alike, testified that his actions were normal and entirely professional, and that he was not impaired in any way. E.g., 20 Tr. 3328:12-16; 6 Tr. 303:3-17, 305:9-06:4; 20 Tr. 3397:17-402:1; Tr. 2822:6-12, 2824:9-26:14; 17 Tr. 2775:19-76:5, 2778:14-80:7; 18 Tr. 2943:17-46:7; 20 Tr. 3492:8-93:3; 11 Tr. 1356:11-12, 1376:18-77:10; 9 Tr. 902:19-04:9, 908:21-09:20; 16 Tr. 2430:12-20. A state court jury *acquitted* him of operating a vessel under the influence. ER (1997) 43-45. And even the district court held as a matter of law that Hazelwood's actions before the pilot left the ship (47 minutes before the grounding) gave no basis to believe he was impaired. ER (1997) 501G & n.11, 501H; CD 60!8 at 2-3. Plaintiffs relied on "reverse extrapolation" from the questionable results of a blood test administered by the Coast Guard late in the morning after the spill. App. 108a-109a. But if the test results and the extrapolation were correct, Hazelwood would have had a blood alcohol level of .166 (which equates to vomiting, blurred vision, staggering, stumbling, and impaired motor skills) even at 3:45 a.m. when Coast Guard officers boarded the vessel, and they would never have left him in command, as they did. 13 Tr. 1834:14-20, 1837:22-39:10.

IV. EXXON'S PRE-GROUNDING CONDUCT AS TO HAZELWOOD, WHICH THE JURY WAS NEVER REQUIRED TO EVALUATE, WAS NOT RECKLESS.

The district court erroneously instructed the jury, based on *Protectus Alpha Navigation Co. v. North Pac. Grain Growers*, 767 F.2d 1379 (9th Cir. 1979), that reckless conduct of a managerial employee, like Hazelwood, is "held in law to be the conduct of the employer." Pet. 11-15. Because of this instruction, the jury was never required to decide whether Exxon's own conduct, independent of Hazelwood, was reckless. The Ninth Circuit conceded that on the record a reasonable jury "could have decided that Exxon followed a reasonable policy of fostering reporting and treatment by alcohol abusers, knew that Hazelwood had obtained treatment, did not know that he was an alcoholic, and did not know that he was taking command of his ship drunk." App. 88a-89a.

As previously stated, *see* Part I, *supra*, plaintiffs' factual contentions do not matter to the issues presented in this case, since the Questions Presented are pure issues of law. Nevertheless, consistent with Rule 15.2, Exxon sets out here what the record shows on these issues.[8] It will be apparent that the facts asserted in plaintiffs' cross-petition are greatly dis-

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[8] The trial record is what matters. Plaintiffs get the standard of review exactly backwards when they repeatedly refer to facts "found" by the courts below. *Cooper Industries* expressly addressed whether appellate courts should give deference to the trial court when reviewing punitive damages awards. This Court concluded that review should be *de novo*, 532 U.S. at 436, and rejected deference. "Considerations of institutional competence therefore fail to tip the balance in favor of deferential appellate review." *Id.* at 440. To be sure, *Cooper Industries* noted that the "Court of Appeals should defer to the District Court's *findings of fact* unless they are clearly erroneous." *Id.* at 440 n.14 (citing *United States v. Bajakajian*, 524 U.S. 321, 336-37, n.10 (1998)). But this presupposes a proceeding, like in *Bajakajian*, in which the district court acts as the factfinder. In a punitive damages case tried to a jury, the trial court does not sit as a finder of fact. Indeed, there *are no* "findings of fact."

torted, and that there is no reason to think that a reasonable and properly instructed jury, had it been required to address the question, would have found Exxon's independent conduct reckless. The instructional error was thus of enormous consequence in this case, and plaintiffs' claim for an *increased* award based on their distortion of the record is specious.

Exxon's alcohol policy before the grounding was consistent with industry standards at that time. It provided that employees would not have "their job security or future opportunities jeopardized due to a request for help or involvement in a rehabilitation effort." PX 158, 22 Tr. 3778:5-80:4, 3783:2-23. The policy embodied a judgment that treatment was the best way to reduce the risk of alcohol-related accidents, and that without job security, those needing treatment would hide their affliction—disserving safety, not enhancing it. PX 158; 14 Tr. 2111:21-13:14; 22 Tr. 3777:12-23, 3802:15-03:1.

Exxon recognized that its alcohol policy entailed some risk that a rehabilitated alcohol abuser might suffer a relapse which would impair job performance. 12 Tr. 564:15-22; 14 Tr. 2113:7-14. But Exxon also knew that persons attempting recovery from alcohol abuse were legally protected from discrimination. 14 Tr. 2080:9-15; 22 Tr. 3780:16-81:6. Accordingly, Exxon established procedures designed not to "infringe on employee privacy or off-the-job activities." DX 3614 at S7304675969; 18 Tr. 2875:16-24. Employees returning to work after treatment for alcohol abuse were monitored by their supervisors solely on the basis of their performance on the job. 18 Tr. 2874:2-13; 22 Tr. 3781:7-82:20, 3805:17-06:9; 14 Tr. 2123:1-25:3.

In early 1985, Exxon heard reports that Hazelwood used alcohol on shipboard in violation of Exxon's rules. 18 Tr. 2879:20-80:3; PX 0172. Soon after, Hazelwood voluntarily entered South Oaks hospital in New York; his primary diagnosis was "dysthymia" (mild depression), with a secondary

diagnosis of "alcohol abuse—episodic" as a consequence of that depression. PX 10; 8 Tr. 774:25-75:16, 779:15-80:3; 13 Tr. 1884:10-21; 20 Tr. 3285:1-88:22. Plaintiffs' expert O'Connor agreed that "alcohol abuse—episodic" is not "alcoholism." 15 Tr. 2307:6-10. Indeed this diagnosis *excludes* alcoholism. 20 Tr. 3287:17-88:5, 3288:23-89:3. Plaintiffs repeatedly assert that Hazelwood was an alcoholic, based on a diagnosis their retained expert offered at the 1994 trial, which in turn was based on a definition of alcohol dependency (alcoholism) that did not even exist in 1985. 15 Tr. 2249:5-22, 2269:12-14, 2300:5-01:7, 2307:6-19. But no such diagnosis was ever given to Exxon before the spill; the *only* diagnosis available to Exxon was that of Dr. Vallury, the South Oaks treating physician, and it said no more than that the *secondary* diagnosis was "alcohol abuse—episodic."

Hazelwood completed the South Oaks treatment program. Two weeks later, Dr. Montgomery of Exxon's Medical Department reviewed his case with Dr. Vallury. Vallury told Montgomery that Hazelwood was fit to return to work, but he recommended a 90-day leave of absence to attend Alcoholics Anonymous and aftercare (group therapy). 13 Tr. 1901:9-05:24, 1906:21-07:9. Vallury also told Hazelwood he had spoken to Montgomery and given clearance for him to return to work. 6 Tr. 328:11-20. Accordingly, Hazelwood was removed from disability status, restored to the duty roster, and approved for a 90-day leave of absence. 20 Tr. 3420:14-21:18; 13 Tr. 1904:13-05:25. Hazelwood attended AA every day during his 90-day leave, but—unknown to Exxon—attended group therapy only for a while. 6 Tr. 321:14-22:1, 322:19-25. After his leave of absence, Hazelwood was summoned to Houston to meet with his supervisor, who told him "that he cannot afford to have any further problems with alcohol or he would be disciplined." 21 Tr. 3589:6-17, 3593:9-94:6. Hazelwood understood, and concluded he would be watched. 6 Tr. 342:8-43:10, 344:3-5.

In light of Exxon's alcohol policy, the President of Exxon Shipping Company, Frank Iarossi, reviewed the decision to return Hazelwood to work. Iarossi concluded that Hazelwood should not be disqualified from command of a tanker, since that would mean other mariners would not seek medical treatment. 12 Tr. 1624:9-27:1. But Iarossi did give orders that Hazelwood's supervisors should keep watch on his job performance. 12 Tr. 1625:15-16.

Hazelwood resumed a master's position in August 1985, first on the EXXON YORKTOWN, and after 1987 on the EXXON VALDEZ. His supervisors monitored him throughout this four-year period, scrutinizing his job performance (which was good), visiting his ships, and checking with other employees for indications of drinking. 21 Tr. 3595:6-97:4; 21 Tr. 3616:10-17:17, 3623:16-25:23; 16 Tr. 2487:13-21, 2488:5-16; 16 Tr. 2560:16-61:6; 22 Tr. 3733:18-37:6. Plaintiffs made numerous criticisms of Exxon's monitoring, and their experts said they would have done various things differently. But there was no evidence that plaintiffs' experts' recommendations represented industry practice. Indeed, plaintiffs' principal expert denied knowing whether that was the case. 17 Tr. 2656:17-57:6.

Plaintiffs' expert also acknowledged that Hazelwood's diagnosis of "alcohol abuse—episodic" would not have led to a requirement for monitoring of employees under the standards applicable to even the most safety-sensitive jobs in America—piloting passenger airplanes. 17 Tr. 2662:8-63:24. The Federal Aviation Administration cancels the licenses of pilots with a history of alcoholism, who may then return to flying only if they participate in a series of monthly monitoring meetings, but pilots whose diagnosis (like Hazelwood's) is "alcohol abuse—episodic" are not subject to cancellation and thus may continue flying without becoming subject to the monitoring requirement at all. *Id.* Exxon thus monitored Hazelwood *more* than the FAA and the airlines would monitor a pilot with an identical diagnosis.

Apparently, Hazelwood abstained for a year after South Oaks, but then resumed drinking, while taking pains to conceal it from his supervisors. 18 Tr. 2896:8-97:3; 21 Tr. 3631:24-32:8; 22 Tr. 3734:8-25; 10 Tr. 1086:11-87:2. Other Exxon employees who later admitted drinking with Hazelwood aboard Exxon ships knew they had violated company rules and concealed it from Exxon. 14 Tr. 1981:3-83:22, 1995:19-24; 14 Tr. 1970:13-72:14, 1974:21-76:1, 1977:12-20.

With three isolated exceptions, no evidence that Hazelwood had relapsed, even slightly, was ever brought to the attention of his supervisors. Hazelwood's supervisors did receive information from a sailor named Shaw in 1986 suggesting that Hazelwood had been drinking; this was carefully checked out and found to be without substance. 16 Tr. 2489:5-90:19, 2493:5-95:16, 2518:15-23:19; 21 Tr. 3675:23-79:24; 21 Tr. 3618:2-23:5. Plaintiffs' expert agreed that Exxon concluded that inquiry appropriately. 17 Tr. 2675:21-24, 2676:18-77:9.

Notwithstanding the fact that these allegations were found to be groundless, and notwithstanding the testimony of their own expert that this incident was properly handled, plaintiffs repeat Shaw's unfounded allegations as if they were true. CP 5. The knowing repetition, as truth, of allegations that have been investigated and found to be false is hardly fair appellate argument.

There was also evidence, construing disputed testimony favorably to plaintiffs, that on precisely *two* other occasions, respectively three and four years after Hazelwood returned from treatment, Hazelwood's supervisors could have learned that he had consumed small quantities of alcohol while ashore—a few beers in his apartment in Portland in May 1988 while his ship was in drydock, and wine with dinner in San Francisco while his ship was being repaired there in

March 1989.[9] Such off-duty drinking was lawful and permissible for any Exxon employee. 18 Tr. 2886:13-19; 22 Tr. 3805:17-06:9; 12 Tr. 1564:23-65:9.

This is the total substance of the evidence that underlies the district court's statement, which plaintiffs feature prominently, that "for approximately three years Exxon's management knew that he was drinking on board their ships." CP 5. If "management" means those with some supervisory responsibility for Hazelwood, the statement is simply false.[10] If what the district court meant was that Hazelwood occasionally drank socially, even on Exxon ships, with seamen under his command who knew they were in violation of Exxon policy, who knew that Exxon terminated seamen for use of alcohol on shipboard, and who deliberately *concealed* their activities from Exxon management, 14 Tr. 1981:3-83:22, 1995:3-24; 9 Tr. 1016:3-10; 14 Tr. 1974:21-76:1, 1977:12-20, then their knowledge of Hazelwood's activities

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[9] Plaintiffs' colorful phrase "hurling curses," CP 5, is not supported by the record, which shows at most that Hazelwood, after all a sailor, used profanity in an argument with another Exxon Master. The witness who observed him did not consider that Hazelwood was drunk. 14 Tr. 2150:6-2151:20, 2155:14-23.

[10] The Ninth Circuit's similar statement that the "highest executives in Exxon Shipping knew that Hazelwood ... had fallen off the wagon and was drinking on board their ships and in waterfront bars," is equally false, for the same reasons. *See* App. 64a, CP 4-5.

cannot reasonably be imputed to Exxon's management and ought not to be a basis for an award of punitive damages.[11]

The ultimate factual issues about Exxon's independent conduct are to what extent in these circumstances an employer may or should conduct special surveillance or monitoring of an employee who has returned from treatment for alcohol or drug abuse. The jury was instructed under *Protectus* that it did not need to reach or resolve those issues. Nor does the Court in order to determine that the instruction was erroneous. But the policy of the federal government in 1985, and to some extent even today, was that such surveillance should *not* be conducted. Contemporary cases under the Rehabilitation Act, 29 U.S.C. § 793, applicable to Exxon as a government contractor, held that requirements imposed on a recovering alcoholic, but not on other employees, discriminate based on a disability. *Teahan v. Metro-North Commuter R. Co.*, 951 F.2d 511, 517 (2d Cir. 1991); *Fuller v. Frank*, 916 F.2d 558, 561 (9th Cir. 1990); *Simpson v. Reynolds Metals Co.*, 629 F.2d 1226, 1231 n.8 (7th Cir. 1980).[12] The same principles obtain under the Americans With Disabilities Act, 42 U.S.C. § 12114. *Compare* 42 U.S.C. § 12112 *with* 42 U.S.C. § 12114(c)(4); *Flynn v. Raytheon Co.*, 868 F. Supp. 383, 387-88 (D. Mass. 1994) (ADA violated by policy against on-the-job intoxication enforced more strictly against an alcoholic); *Schmidt v. Safeway, Inc.*, 864 F. Supp.

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[11] Plaintiffs say that Exxon had an "alcoholic culture." CP 4. Again, if plaintiffs mean that Exxon encouraged or tolerated drinking, there is no evidence to support that. Quite the contrary. Neither the Coast Guard nor most shipowners forbid drinking on shipboard; Exxon did and still does. 14 Tr. 2107:22-09:13, 2109:14-22. As the citations in the text indicate, sailors testified that they knew Exxon's policy, knew it was enforced, and knew of crew members fired for violations. Hazelwood himself was told by his supervisor in 1985 that he would be disciplined for any further problems with alcohol. 21 Tr. 3593:9-94:6.

[12] Not just alcoholism, but Hazelwood's actual primary diagnosis, dysthymia, has been held to be a disability for purposes of the Rehabilitation Act. *Mendez v. Gearan*, 956 F. Supp. 1520 (N.D. Cal. 1997).

991, 1000, 1002 (D. Ore. 1994) (discharge of alcoholic driver of 50-ton truck for showing up drunk impermissible unless company policy applied to all employees, not just alcoholics).[13]

This is not an issue dreamed up by Exxon's defense counsel. When, after the spill, Exxon changed its alcohol policy, and determined that no one with a history of drug or alcohol abuse should be allowed to occupy an unsupervised safety-sensitive position—exactly the position plaintiffs say Exxon should have taken with Hazelwood—the Department of Labor promptly ruled the policy unlawful under the Rehabilitation Act. *OFCCP v. Exxon Corp.*, 62 Empl. Prac. Dec. (CCH) ¶ 42, 487 (D.O.L., June 15, 1993), *aff'd*, 1996 WL 662445 (D.O.L., Oct. 28, 1996), *rev'd*, 2002 U.S. Dist. LEXIS 3540 (N.D. Tex. March 2, 2002). In a separate proceeding, the Department found unlawful Exxon's policy of requiring employees returning from treatment to enter an After Care program and abstain from alcohol for two years. RER (1997) 143-45. The Equal Employment Opportunity Commission filed suit, in 1995, on the theory that the new policy discriminated against persons with the disability of alcoholism. *See EEOC v. Exxon Corp.*, 124 F. Supp. 2d 987 (N.D. Tex 2000). The new policy was also challenged in more than 100 lawsuits and arbitration proceedings. 42 Tr. 7491:7-14. Although Exxon eventually prevailed in most of this litigation, because the law on these subjects has materi-

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[13] Of course a "current user" may be disciplined, but even a "current user" may not be disciplined for off-duty conduct that would not result in discipline of a non-disabled person. *Rodgers v. Lehman*, 869 F.2d 253, 259 (4th Cir. 1989) (discipline permissible only for job-related misconduct); *Fuller*, 916 F.2d at 561-62 (same); *see also Teahan*, 951 F.2d at 520. "Two events are seemingly necessary [to justify disparate treatment] after an ... employee returns from in-patient treatment—both a relapse and poor performance." *Reilly v. Kemp*, 1991 WL 173183, at *5 (W.D.N.Y., Aug. 29, 1991). Hazelwood's job performance was satisfactory, and his supervisors had absolutely no evidence of on-the-job drinking.

ally changed since 1989 (in part as a result of the spill itself), Exxon has lost some cases, too. *See, e.g., Exxon Shipping Co. v. Exxon Seamen's Union*, 73 F.3d 1287 (3d Cir. 1996), on which then-Judge Alito sat. That case upheld an arbitrator's decision that a sailor holding the job of pumpman on the EXXON WASHINGTON, a safety-sensitive position, could not be terminated although marijuana was found in his cabin during an unannounced drug search.

Alcohol abuse is a serious social problem, and no one—not Congress, not the courts, not lawyers, doctors, or businessmen—has yet devised a perfect solution that reconciles the competing policies favoring safety, employee privacy, and rehabilitation of alcohol abusers. Given the competing concerns, companies and governments devise differing policies, and sometimes change them, as Exxon eventually did here. But there was no showing that Exxon's alcohol policy in 1985 or 1989, or the way it was applied to Hazelwood, was unreasonable, or deviated from the industry standard at the time. Plaintiffs' expert conceded that even an airline pilot who (unlike Hazelwood) had a history of alcoholism, and who (like Hazelwood) was two years out of treatment, would not have been prevented from flying a commercial passenger aircraft because of moderate use of alcohol in an off-duty setting. 17 Tr. 2672:20-73:2. The facts known to Exxon's management about Hazelwood's activities, interpreting all evidence favorably to plaintiffs—that more than three years after his treatment he had returned to moderate use of alcohol in off-duty settings—would not have prevented Hazelwood, under the FAA's rules, from piloting a passenger airplane, even if he had been an alcoholic.

Frank Iarossi, President of Exxon Shipping, regarded whether to return Hazelwood to his job as "a question that had no correct answer. We had risks on both sides." 12 Tr. 1625:20-23. Exxon's alcohol policy balanced the risk of returning employees to their jobs against the risk that without job security employees seeking treatment might never come

forth. Exxon's policies about monitoring employees balanced the employer's desire for information against employee privacy and the rights of the disabled. Iarossi balanced the same considerations when he approved Hazelwood's return to work. He balanced them in favor of encouraging employees to seek treatment, because he believed that was the course most likely to maximize safety and minimize accidents. Coast Guard Admiral Yost "agonized" over like decisions. "You sit there as the [corporate] leader and decide, do I let this guy go back to his job or do I ruin his life and his career when he's just made a great effort to be rehabilitated.... It's a very difficult corporate decision." 19 Tr. 3205:11-17.

The recklessness that will support punitive damages, this Court has held, is "reckless indifference to the rights of others which is equivalent to an intentional violation of them," or "that entire want of care which would raise the presumption of a conscious indifference to consequences." *Smith v. Wade*, 461 U.S. 30, 42-43 (1983). The legal standard for recklessness thus requires "conscious indifference" to a risk, but a defendant is not "indifferent" to a risk when it acts in the belief that its policies are the best way to minimize that risk, nor when it weighs the risk against other important considerations and strikes a balance. Both Exxon's alcohol policy, and the way it was applied to Hazelwood, represented good faith judgments about the best way to balance competing policy considerations. Perhaps a jury that was required to reach the issue (as the jury below was not) could find that Iarossi's decisions were wrong, given the benefits of hindsight. But as the Ninth Circuit acknowledged, App. 88a-89a, a jury certainly would also have been entitled to find that Iarossi's actions did not manifest the "entire want of care" necessary to establish the "conscious indifference to risk" required by this Court's precedents, and therefore were not legally reckless.

Resolution of the important legal issues in this case does not depend in any way on the outcome of the factual issues discussed in this section. Exxon addresses them only because of Rule 15.2. But it was a fatal defect in the proceedings below that the jury was instructed that in order to find Exxon reckless it did not even need to *consider* whether what plaintiffs are now saying was true.

CONCLUSION

For the foregoing reasons, the conditional cross-petition for a writ of certiorari should be denied.

Respectfully submitted,

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